

RENDERED: FEBRUARY 10, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000275-MR

WILLIAM DILL

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 03-CR-00306

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
DISMISSING APPEAL

** ** * * *

BEFORE: BARBER AND McANULTY, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: William Dill (Dill), *pro se*, brings this appeal of an order of the McCracken Circuit Court, entered January 18, 2005, denying his *pro se* motion to reconsider the denial of his motion to vacate his five-year sentence arising out of an unconditional guilty plea to second-degree trafficking in a controlled substance (Lortab) and third-degree trafficking

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

in a controlled substance (Xanax),² pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Because Dill did not timely file his notice of appeal, we have no jurisdiction to consider the appeal. Therefore, it must be dismissed.

On December 14, 2004, the order summarily denying Dill's RCr 11.42 motion was entered. Seventeen days later, on December 31, 2004, Dill mailed to the court clerk a motion for reconsideration of the December 14, 2004, order. Dill's motion for reconsideration was summarily denied by the trial court by order entered January 18, 2005. Dill appealed this denial by mailing his notice of appeal to the court clerk on January 24, 2005.

Pursuant to RCr 11.42(8) and 12.04, the notice of appeal from the denial of Dill's RCr 11.42 motion was due by January 13, 2005, which was within thirty days of the entry of the order. Dill did not file a notice of appeal within thirty days. Instead, Dill mailed a motion for reconsideration to the court clerk within seventeen days. Assuming for sake of argument that this motion should be construed as a motion to alter, amend or vacate pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, timely service of the motion not later than ten days after entry of the final judgment tolls the time

² Kentucky Revised Statutes 218A.1413 (class D felony) and 218A.1414 (class A misdemeanor). Dill was also indicted as a first-degree persistent felony offender. KRS 532.080. As a result of the plea, this charge was dismissed.

for filing a notice of appeal. See CR 73.02(1)(e). As Dill's motion for reconsideration was mailed seventeen days after entry of the December 14, 2004, order denying his RCr 11.42 motion, it was not served within ten days. As such, it was not timely served so as to toll the running of the thirty-day period for filing an appeal from the December 14, 2004, order. Even assuming that Dill's notice of appeal properly referenced that it was appealing the December 14, 2004, order denying the RCr 11.42 motion, its mailing on January 24, 2005, was outside the thirty-day time limit. As we lack jurisdiction to consider the appeal, it must be dismissed. See United Tobacco Warehouse v. Southern States Frankfort Cooperative, Inc., 737 S.W.2d 708, 710 (Ky.App. 1987).

It is hereby ORDERED that this appeal be, and it is, DISMISSED.

ALL CONCUR.

ENTERED: February 10, 2006

/s/ John Miller
SENIOR JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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